87-664

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term 1987

JOHN W. RAMMING, PETITIONER

V.

THE STATE OF NEW MEXICO, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE NEW MEXICO COURT OF APPEALS

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53 pp

QUESTIONS PRESENTED

1. Whether the trial court erred and deprived petitioner of his right to an impartial jury by conducting voir dire of a juror outside his presence?

2. Whether the spillover of evidence admissible only against a co-defendant prejudiced petitioner sufficiently to require a severance?

3. Whether the prosecutor's closing argument constituted prosecutorial misconduct so as to deny petitioneral due process of law and a fair trial?

4. Whether the Court of Appeals of New Mexico denied petitioner equal protection and due process of law and the effective assistance of counsel of appeal by refusing to allow him to amend his docketing statement to include an issue and further by considering the issue in its opinion even though not briefed?

PARTIES TO THE PROCEEDINGS

The only parties to the proceedings are those listed in the caption. Six other individuals were named in the indictment. This petition is sought only by John W. Ramming.

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IN THE

Supreme Court of the United States

October Term 1987

No. _____

JOHN W. RAMMING, Petitioner,

vs.

THE STATE OF NEW MEXICO, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE NEW MEXICO COURT OF APPEALS

John W. Ramming petitions for a Writ of Certiorari to review the judgment of the Court of Appeals for the State of New Mexico.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of New Mexico is not yet reported. It appears in the appendix (App. Infra. a-1 to 14).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). The New Mexico Supreme Court without comment denied Petitioner's Application for a writ of Certiorari on June 17, 1987 and his motion to reconsider its previous denial on July 20, 1987. This Court granted Petitioner's motion for an extension of time to file this petition to and including October 19, 1986.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides in pertinent part:

> No person . . . shall . . . be deprived of life, liberty or property without due process of law. . . .

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and . . . to be confronted with the witnesses against him; . . . .

The Fourteenth Amendment provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunity of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . .

FACTS MATERIAL TO THE QUESTIONS PRESENTED

A Santa Fe County, New Mexico grand jury charged defendants CRW Construction Corporation ("CRW"), Richard Rowand ("Rowand"), John Ramming ("Petitioner"), Pete Mondragon ("Mondragon"), Hallie Vigil ("Vigil"), Valdez Engineering and Levi Valdez with conspiracy to fix public contracts entered into to repair the damage caused by flooding and other disasters declared by the Governor. Petitioner was an aide to the Governor, with, among other tasks, the responsibility for overseeing the administration of disaster declarations on behalf of the Governor. (T. 30:273-301).[1] Roward was a private contractor and principal owner of CRW. (T. 24:049; 62:813; 80:359; 83:195). Levi Valdez was an engineer and principal owner of Valdez Engineering. (T62:227-31). Hallie Vigil is Mondragon's daughter. (T29:125-65). Mondragon was an employee of the Civil Emergency Preparedness Division ("CEPD"). (T 65:245).

In summary, the state alleged that the defendants conspired with CEPD to contract directly with CRW and Valdez Engineering for the performance of projects related to natural disasters, such as bridge replacement and irrigation ditch repair. The state alleged that both Mondragon and petitioner received payments from Rowand or CRW for participating in fixing the contracts.

Petitioner was charged with two counts of receiving illegal kickbacks, two counts of bribery, ten counts of fraud, one count of conspiracy and one count of racketeering. He was convicted on all counts except the two counts of bribery and one of the fraud counts.

During the pendency of the appeal below, the then Governor of New Mexico pardoned petitioner of his convictions and sentences on all counts except the one count of conspiracy. Petitioner abandoned his appeal as to those counts for which he was pardoned. Petitioner continued his appeal from his conviction for conspiracy. All of the questions

[1]Citations to the trial transcript (T. or T. Supp.) are by tape number followed by the tape recorder meter number.

presented in this petition were before the court below. The New Mexico Court of Appeals affirmed. (App. a).

Petitioner sought discretional review in the New Mexico Spureme Court. All of the questions and reasons set forth before this Court were also raised for review by the New Mexico Supreme Court. The New Mexico Supreme Court denied review without comment as well as Petitioner's motion to reconsider.

By pre-trial motion, the defendant moved for a severance from all co-defendants. (R. 263, 716).[2] The trial court granted a partial severance but ordered petitioner to be tried with co-defendants Mondragon and Vigil. (T. 6:044). The basis for the court's grouping of defendants following severance was on the order they appeared in the indictment. (T. 6:044). Before their separate trial began, Rowand, CRW, Levi Valdez and Valdez Engineering pled guilty. The case against Vigil was dismissed following the trial court's directed verdict of acquittal after the state rested its case. (T. 93:001).

Most of the voir dire of the jury took place in the court room with all counsel participating and all defendants present. (T. 19:007). During the selection process, the defendant used all of his peremptory challenges. (T. Supp. 1 & 2). After twelve jurors and the alternates had been selected, the court ordered the prospective jurors to return to the courtroom at 1:30 p.m. (T. 19:085). The court mentioned that one juror had requested a meeting with the court. (T. 19:092). The court and counsel spent the next several minutes discussing the use of exhibits during opening statements. (T. 19:115-566). After that discussion, the court asked counsel if they wanted to be present while he found out what the juror wanted. (T. 19:570). Assistant Attorney General Fred Smith requested that counsel be present. (T. 19:575). The court never asked the defendant if he wished to be present, and counsel never waived the defendant's presence.

The court first met alone with the juror. The court then invited

[2]Citations to the trial court record will be "R" followed by the page number.

counsel into chambers and conducted an additional voir dire of the juror, Ms. Victor. (T. Supp. 3:013). After speaking with the juror and asking her questions regarding her concern that the jury could not understand the complexities of this case, the court ordered the juror back to the jury room. Counsel remained and continued to discuss this juror. All counsel for defendant Ramming said that they had no problem with this juror on the jury. (T. Supp. 3:135). All counsel and the court went back into the court room and the jury was sworn to try the case. (T. 19:633).

At trial the evidence against Mondragon consisted largely of testimony by his co-workers in CEPD, together with testimony by local officials and experts regarding the work done by CRW and their contacts with both Rowand and Mondragon. (T. 24:414; 25:139; 290; 29:070-96, 150-67; 40:181-93, 376-97, 519-40, 786-834; 41:001-05, 51-54, 53, 185-310, 342-56, 376-420; 54:120-141; 70:426-47, 506; 72:034-56, 843-65; 80:25-31). The state introduced testimony and documentary evidence demonstrating that Mondragon was in constant contact with Rowand, CRW and Levi Valdez. (T. 40:080, 181-93, 203-19, 519-24). The evidence demonstrated clearly that it was Mondragon who had arranged the direct contracting with CRW. (T. 62:079, 169, 267, 507, 828; 63:130, 204, 317, 600, 873; 64:035; 65; 553-560). In addition, the evidence established clearly that Mondragon received bribes and kickbacks from Rowand/CRW and that such payments were intentionally disguised by Rowand and Mondragon through the purchases of vehicles in Mondragon's daughters' names. (T. 29:076-108). Finally, the evidence established that after the conspiracy allegations became public, Mondragon and Rowand engaged in a corrupt and crude scheme to hide the pact of these payments by seeking to have Mondragon's daughter perjure herself by testifying that Rowand had given her the truck while he was having an affair with her. (T. 29:076-105). The contracts which were funneled to CRW totaled in excess of $2,800,000. (T. 25:352). In short, the evidence against Mondragon demonstrated that Mondragon had aggrandized to himself control of the contracting and payment process and handled that process in a grossly corrupt fashion.

The evidence against petitioner, on the other hand, was primarily circumstantial. It consisted of demonstrating petitioner's role in the

declaration of emergencies, his friendly relationship with Rowand, contacts between himself and Rowand during a relevant period, the payment to petitioner by Rowand/CRW of a total of $15,000 which petitioner testified was a loan and upon which interest had been paid (T. 128:423), and petitioner's deceptiveness about his relationship with Rowand when he was asked about it in the course of the state's investigation (T. 31:215-25, 334-63, 617-44; 80:361-76, 422-89, 625-84).

In contrast to the surreptitious payments to Mondragon, the $15,000 petitioner received from Rowand was carried openly on CRW's books (T. 83:201, 285), and was conveyed to petitioner openly by check (T. 83:220-245, 292).

During its case-in-chief, the state called Monica Romero, who is the daughter of the defendant Mondragon to testify concerning a conversation she had had with Rowand and Mondragon *following* the commencement of the Attorney General's investigation of the emergency contracts. She testified that Rowand and Mondragon requested that she lie about the circumstances of Mondragon's pickup truck having been placed in her name. Specifically, Rowand and Mondragon asked her to tell the authorities that she had received the pickup truck from Rowand while having an affair with him. (T. 29:076-105). The purpose of this request to her by Rowand and Mondragon was to cover up their involvement in the bribery/kickback scheme. (T. 29:053). This conversation occurred after all acts alleged in the indictment and proved at trial, which purportedly constituted the conspiracy. (T. 29:007).

Prior to her testimony, defendant petitioner objected to this testimony on the grounds that it was hearsay and that it occurred outside the period of the conspiracy and was therefore inadmissible against Ramming. (T. 28:615-710). The trial court overruled the objections and instructed the jury that it could consider this evidence against petitioner. (T. 29:147). Petitioner repeatedly moved for severance throughout the trial. (T. Supp. 4:181; 73:107; 113:286; 143:245). The trial court denied his motions. (T. Supp. 4:186; 73:110; 113:476; 143:828).

During rebuttal closing argument the prosecutor said "John Ram-

ming and Dick Rowand made a million dollars on this criminal enterprise." (T. 158:353). There was no evidence nor any reasonable inference from any evidence to support this statement. At a hearing held after the conclusion of the argument, prior to the submission of the case to the jury, the defendant objected to the statement and moved to strike. (T. 159:073-079).

The judgment and sentence in this case were entered on May 5, 1986 (R. 817-18), and the notice of appeal was timely filed on May 8, 1986. (R. 996). The trial lasted six weeks. Most of the trial transcript is on 200 cassette tapes. Petitioner's trial counsel filed his docketing statement in the court below as required by Rule 208(a) of the New Mexico Rules of Appellate Procedure on June 2, 1986. (App. a-1). Petitioner retained new counsel, experienced in criminal appellate practice, to represent him on appeal below. They entered their appearance on June 11, 1986. On June 12, 1986, the court below entered its first calendaring notice proposing summary affirmance.

Petitioner's appellate counsel moved for an extension of time in which to file a memoradum in opposition to the calendaring notice and for permission to file an amended docketing statement. The New Mexico Court of Appeals granted those motions and extended the time for filing to August 4, 1986 on which day both were filed. Petitioner and counsel ordered from the clerk of the trial court 113 cassette tapes. By August 4, 1986, 100 tapes had been received but neither petitioner nor counsel had been able to thoroughly review them. The tapes were first requested on May 22, 1986. They were received in stages during the period of June 25, 1986 to August 4, 1986.

On August 7, 1986, the New Mexico Court of Appeals, again assigned the case to the summary calendar proposing summary affirmance stating that "defendant has not shown with specificity what evidence was admitted becuase it was a joint trial that would not have been admissible against him in a separate trial. On August 13, 1986, petitioner moved for an extension of time within which to file his brief in opposition to summary afirmance explaining, inter alia, that petitioner's appellate counsel's efforts to become familiar with the facts of the case

had been impeded by the failure of the district court's court reporter to provide copies of the tapes until immediately prior to the date petitioner's amended docketing statement was due for filing. The court below partially granted that motion allowing petitioner until August 30, 1986, to file his memorandum in opposition to summary affirmance.

On August 27, 1986, petitioner filed his second motion for extension of time in which to respond to the Court of Appeals second calendaring notice proposing summary affirmance. In this motion, petitioner explained to the New Mexico Court of Appeals that he had discovered numerous additional transcripts of bench conferences which he had not previously known existed and which may contain objections necessary to preserve reversible error. Petitioner made this discovery because the tapes which he had previously been provided appeared to have some unexplainable gaps. Petitioner discovered that although the portions of the trial before the jury and bench conferences outside the hearing of the jury were tape recorded, only stenographic notes were prepared of bench conferences held in the judges' chambers. Those stenographic notes were located in the desk drawer of the trial judge's court reporter. After petitioner discovered that his tape log was not complete, he contacted the court reporter who then began to dictate those notes onto tapes. Petitioner's motion requested 20 days in which to respond to the Court of Appeals second calendaring notice because his counsel believed that much time would be necessary to receive the transcripts or tapes and, therefore, to respond effectively to the New Mexico Court of Appeals' second calendaring notice proposing summary affirmance. The New Mexico Court of Appeals granted 10 days and said petitioner's trial counsel was expected to cooperate with his appellate counsel in reconstructing the bench conferences.

Petitioner's appellate counsel met with trial counsel regarding the New Mexico Court of Appeals order; however, trial counsel did not have adequate independent notes or recollection of the bench conferences. Consequently, petitioner's appellate counsel had nothing upon which to rely except the still unavailable transcripts or tapes.

On September 3, 1986, petitioner filed another motion for exten-

sion of time in which to respond to the New Mexico Court of Appeals second calendaring notice, stating as grounds that counsel still did not have the tape log or tapes from the newly discovered bench conferences, although counsel had made diligent efforts to receive them. The New Mexico Court of Appeals denied that extension of time except for two days, changing the deadline from September 9 until September 11, 1986.

On September 3, 1986, petitioner also filed a motion to amend his docketing statement by interlineation. Petitioner explained in that motion, good cause existed for the amendment because counsel, in continuing to examine the transcript, had found a substantial issue of reversible error. That issue was founded on the testimony of Monica Romero that involved only co-defendant Mondragon that had been admitted over timely objection of petitioner's trial counsel. The New Mexico Court of Appeals denied the motion to amend the docketing statement and held the new issue sought to be raised was frivolous and that motions to amend docketing statements are timely on summary calendar assignments if filed before the expiration of time for filing the first memorandum in opposition.

On September 11, 1986, petitioner filed a petition for alternative writ of prohibition and superintending control in the New Mexico Supreme Court (No. 16,594) asking it to order the New Mexico Court of Appeals to accept his amended docketing statement and for an extension of time in which to respond to its calendaring notice proposing summary affirmance. Following oral argument the New Mexico Supreme Court denied the writ. On September 24, 1986, petitioner also filed his second memorandum in opposition to summary affirmance on September 11, 1986.

On October 8, 1986, the New Mexico Court of Appeals placed the appeal on its limited calendar. On November 21, 1986, petitioner filed a motion in the New Mexico Court of Appeals requesting leave to file a second amended docketing statement and supplemental transcript. The motion was based on the fact that because the complete record was not filed until November 12, 1986, petitioner's counsel did not have access to the supplemental transcript prepared by the court reporter from

stenographic notes that had been in his desk.

On November 24, 1986, the New Mexico Court of Appeals ordered petitioner to brief the issues of his right to a full transcript and of his right to amend his docketing statement to include the hearsay issue. The court also ordered him to (conditionally) brief the juror issue raised in his second amended docketing statement. (Question 3 of this petition).

Petitioner filed his brief in chief in the court below as it ordered on December 8, 1986.

Petitioner conditionally briefed, as ordered, and the court below ruled upon the juror issue. (See p. 24 of this petition and App. a-5). Petitioner did not fully brief the hearsay issue since both the court below and the New Mexico Supreme Court on application for a writ of certiorari had denied requests to include it by amending the docketing statement. The general issue of petitioner's right to amend his docketing statement was raised: by motions in the court below and denied by it; in petitioner's responses to docketing assignments by the court below; in petitioner's application for a writ of prohibition in the New Mexico Supreme Court (No.16,594) which was denied; and, in his briefs in the court below.

REASONS FOR GRANTING WRIT

1. THE DECISION BELOW FINDING THAT THE TRIAL COURT'S COMMUNICATION WITH A PROSPECTIVE JUROR OUTSIDE OF HIS PRESENCE DEPRIVED PETITIONER OF HIS SIXTH AMENDMENT RIGHT TO BE PRESENT AT EVERY STAGE OF THE TRIAL AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND IS INCONSISTENT WITH A DECISION OF THIS COURT.

The following facts relevant to this issue set forth in the New Mexico Court of Appeals' opinion are correct:

"Defendant claims that voir dire of a juror outside his presence

denied him a fair trial. This issue arose before the jury was selected, but before it was sworn, when one juror wanted to tell the trial court that she feared the other jurors were not intelligent enough to decide the case. At this point, the defendant had exhausted all of his peremptory challenges. In the presence of all counsel and defendants, and before anyone knew what the juror wanted, the participants decided that only the trial court and counsel would talk with the juror. . . ." (App. a-12).

Despite the agreement between counsel and the trial court that they would all meet with the prospective juror, the trial judge first met alone with her in chambers before meeting with her and counsel. The New Mexico Court of Appeals, however, found that ". . .the record is less than clear as to whether counsel were in the room during the conversation. In an issue such as the one under consideration, the record must affirmatively show absence. *State v. Hinojos*, 95 N.M. 659, 625 P.2d 588 (Ct. App. 1980). (App. a-14). Petitioner submits that the record unequivocally establishes that the first conference involved the trial judge and juror alone. It also indicates clearly that a meeting was held between the trial judge and juror off the record. Because this conversation was not recorded, it is not even clear when the trial court had the initial conversation with the juror. There is no indication of what else was said during the conversation. All that appears of record is the trial judge's reference on the record to his prior conversation with the juror at which time he explained she had not been finalized:

> Court: Ms. Victor, the attorneys think perhaps they should participate but if you don't want them to that is fine but I will have to relate something to them.
>
> Juror Victor: It is not the attorneys I am worried about.
>
> (All counsel present)
>
> Court: We are convened in the court's chambers with prospective juror Zennia Victor present and all counsel of record are in attendance. Ms. Victor has no problem speaking in the presence of counsel, she did preface something saying she did not realize

she was finally selected at that point and I told her she had not been finalized but we had gotten down to the point where she would be included in the panel.

T. Supp. 3:001.

In his brief in chief below petitioner argued that *State v. Garcia*, 95 N.M. 246, 620 P.2d 1271 (1980) controls in this situation. In *Garcia*, the New Mexico Supreme Court held that the defendant has a right to be present at every stage of the trial, and that the "making of challenges was an essential part of the trial." 95 N.M. at 249, 620 P.2d at 1274, relying on *Lewis v. United States*, 146 U.S. 370 (1892). In *Lewis*, the United States Supreme Court reversed the conviction of a defendant who was not present during the challenging of prospective jurors. The Court stated: "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner." 146 U.S. at 372.

"The right to be present at every stage of the trial is grounded in the Sixth Amendment to the United States Constitution and made applicable to the states through the Fourteenth Amendment." *State v. Garcia* 95 N.M. 246, 249, 620 P.2d 1271, 1274 (1980). *Garcia* also holds that in addition to the defendant's right to be present under the United States and New Mexico Constitutions, Rule 47(a) of the New Mexico Rules for Criminal Procedure provides that a defendant *shall* be present at "every stage of the trial." (App. C-1). Although Rule 47 provides that the right can be waived, the defendant did not waive his right here. The court cannot presume a waiver from a silent record. *Hovey v. State*, 104 N.M. 667, 726 P.2d 344 (1986).

The New Mexico Court of Appeals did not discuss whether or not the Petitioner waived his absence. The New Mexico Court of Appeals, however, at least in part based its decision on this issue on the presence of petitioner in the courtroom when the trial judge and counsel agreed to meet with the juror and he did not object. (App. a-12). The trial judge did not invite the petitioner to be present. The state admits that any waiver must be made voluntary, knowingly and intelligently (Answer

Brief at 2). No record exists in this case that any waiver was made, much less the required voluntary, knowingly and intelligent waiver. *Hovey v. State*, 104 N.M. 667, 726 P.2d 344 (1986). Petitioner further submits that a waiver could not have been knowingly and intelligently given when the subject matter of what the juror wanted to talk about was unknown until the conference between the judge and the juror was held in his chambers.

The New Mexico Court of Appeals held in part that *Garcia* does not apply because it ". . . involved the selection of a jury whereas, here defendant agrees the jury had not already been selected". (App. a-12). Neither the record nor the New Mexico Court of Appeals' opinion supports that finding. The New Mexico Court of Appeals itself found elsewhere that "[a]fter the trial court and counsel questioned the juror and ascertained her concern, and were satisfied this would not affect her ability to serve, all counsel agreed that they still wanted this juror to sit on the jury". (App. a-12).

The New Mexico Court of Appeals also bases part of its decision upon its finding that "[d]efendant could have done nothing about this juror in any event". (App. a-13). At another point in the opinion the New Mexico Court of Appeals said: "[d]efendant's only reason for belatedly wishing to be present during the conversation is so that he could 'assess any negative visceral reaction he felt toward the jury, to consult with and advise his counsel, and to challenge the juror for cause based on her answers'. We know of no authority that would allow a defendant to challenge a juror for cause for this reason". (App. a-13).

Similarly, in *State v. Carver*, 94 Idaho 677, 496 P.2d 676 (1972), the defendants were not in the courtroom during voir dire. After noting that the right to be present during the trial is of constitutional proportions and that it is a matter of settled law that the impaneling process is part of the trial, the court discussed the rationale for this requirement focusing on the need for the defendant to assist his counsel in the jury selection process. "The defendant may wish to challenge a particular prospective juror for any one of several valid reasons, one of which may be a negative visceral reaction." 94 Idaho at 680, 496 P.2d at 679. In *Garcia*, Jus-

tice Easley also found that "[t]he lawyer *and the defendant* must make a diligent effort to read every reaction of each juror to the lawyer *and the client*" and it is "especially vital to note the facial expression, if any, of the jurors when they are looking *at the defendant*." *State v. Garcia*, 95 N.M. 246, 249, 620 P.2d 1271, 1274 (1980) (emphasis added).

This juror was raising a serious question regarding her ability to serve. She was claiming this jury could not decide the case. The defendant had a right to be present, to assess any "negative visceral reaction" he felt toward the juror, to consult with and advise his counsel, and to challenge the juror for cause based on her answers.

Furthermore, it is well-settled in "New Mexico that it is improper for the trial court to have any communication with the jury concerning the subject matter of the court proceedings except in open court and in the presence of the accused and his counsel." *Hovey v. State*, 104 N.M. 667.

It is equally well settled in New Mexico that a "presumption of prejudice arises whenever such an improper communication occurs, and the state bears the burden of rebutting that presumption by making an affirmative showing on the record that the communication did not affect the jury's verdict." *Hovey v. State*, 104 N.M. 667 (1986). There is no record here; therefore the state cannot meet its burden. Petitioner is entitled to a new trial.

2. THE DECISION OF THE COURT OF APPEALS OF NEW MEXICO HOLDING THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FAILING TO GRANT PETITIONER A SEVERANCE IS INCONSISTENT WITH DECISIONS OF THIS COURT AND FEDERAL COURTS OF APPEALS.

During the trial of both defendants, the court admitted, over petitioner's and Mondragon's objections, highly inculpatory testimony from Mondragon's daughter, Monica, which described a post-conspiracy, criminal coverup effort by Mondragon and the previously severed defendant, Rowand. The evidence consisted of hearsay and a description

of post-conspiracy conduct by Rowand and Mondragon.

Because this conduct and the hearsay statements describing it occurred in July of 1985, following the termination of the alleged conspiracy (T. 29:001-70; 31:280; 37:035-39) (indeed, the described conduct and statements occurred after the public investigation of the CEPD contracts had begun and after petitioner and Mondragon had been relieved of their duties), the statements were inadmissible against Ramming. *Grunewald v. United States*, 353 U.S 391 (1957); *State v. Farris*, 81 N.M. 589, 470 P.2d 561 (Ct. App. 1970).[3]

At a bench conference regarding Romero's testimony, petitioner objected to the testimony as being outside the scope of the conspiracy and therefore inadmissible against him in his joint trial. (T. 28:615-710).[4] In-

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[3]Petitioner previously sought to amend his docketing statement to include the issue of the admissibility of Romero's testimony against Ramming—*wholly aside from the issue of whether its admission constituted a basis for severance.* Motion to amend docketing statement of September 4, 1986. The court denied the motion and, on the basis of that denial, *Ramming has not formally briefed the issue.* If Ramming had been permitted to raise that issue, an abbreviated argument or appeal would have been as follows: There was no evidence that any acts in furtherance of the conspiracy occurred after May, 1985, which was the date by which John Ramming had been relieved of his duties and Mondragon had been fired. (T. 31:280; 37:035-39). The statements made to Monica Romero by Rowand and Mondragon, which constituted an admission of the conspiracy and a corrupt attempt to cover it up, were made in July of 1985. (T. 29:001-70). Romero's testimony regarding Rowand's and Mondragon's conversation with her were inadmissible hearsay because the statements to her occurred after the alleged conspiracy had clearly concluded. Precisely on point with respect to this issue are the leading United States Supreme Court cases of *Krulewitch v. United States*, 336 U.S. 440 (1949), and *Grunewald v. United States*, 353 U.S. 391 (1957), which hold that such statements are absolutely inadmissible against a non-present, non-declarant defendant such as Ramming. New Mexico is in accord. *See State v. Farris*, 81 N.M. 589, 470 P.2d 561 (Ct. App. 1970), holding co-conspirator statement made prior to commencement of conspiracy inadmissible. A further discussion of the Court of Appeals' denial of the motion to amend the petitioner's docketing statement appears under reason 4 (p. 24) of this petition.

[4]In the course of the bench conference, counsel for petitioner stated in part: "I have an objection to anything she says that does not relate to his being tied to a conspiracy . . . . [S]he has no testimony concerning John Ramming . . . I want to make that [hearsay] objection at this point, prior to her getting into that." And later, "They have to find a conspiracy, and what they're trying to do, except that this is a statement given after the

stead of excluding the testimony, the trial court told the jury *that it could consider it against Ramming:*

> Ladies and gentlemen of the jury, the court instructs you that the testimony being elicited from this witness may seem to bear on one or more of the defendants in the case or may seem to focalize principally on one, and any of that—all of the evidence is subject to connection and further instruction by the court at a later time, and this evidence will be considered by you, together with all the other evidence in the case, for such weight as you may choose to give it, bearing on the cases of any of the defendants herein. You may proceed.

T. 29:147.

Appellate courts unanimously grant trial judges broad discretion in granting or denying motions for severance. *See, e.g., State v. Baca,* 85 N.M. 55, 508 P.2d 1352 (Ct. App. 1973). Reversal for failing to sever will only be granted when a defendant is able to demonstrate an abuse of discretion which resulted in prejudice. *Id.*

In this case, the district court abused its discretion by failing to sever after it became conclusively apparent that inculpatory evidence against Mondragon had spilled over onto petitioner. Indeed, this spillover of evidence occurred as a direct result of the conduct of the trial judge in instructing the jury that it could consider against petitioner evidence which was admissible only against Mondragon.

It is undeniable that almost all appellate decisions which address complaints of prejudicial spillover affirm trial courts' denials of severance. Those decisions of this court and federal courts of appeals, however, contain compelling arguments why severance should have been granted in this case and why the trial court's failure to sever was an abuse of discretion. The cases uniformly base their refusals to reverse on the appellate courts' conclusions that the juries were able to compartmentalize the evidence against the defendants by following the trial courts'

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conspiracy had ended." The full colloquy among counsel and the court appears at T. 28:615-710.

limiting and cautionary instructions. That is, when evidence admissible only against one defendant was admitted, severance was properly denied where the court carefully cautioned the jury not to consider the evidence against the other defendants.

In a similar case, the Second Circuit Court of Appeals reasoned as follows:

> Joost complains that the admission into evidence of two post-conspiratorial hearsay statements by Guillette . . . had a spillover effect on him and constituted grounds for severance . . . .
>
> While post-conspiratorial utterance of a co-conspirator may not be used to establish the culpability of other co-conspirators, . . . such statements are admissible against the declarant *provided cautionary instructions are given to the jury*. . . . In admitting Guillette's hearsay statements, the trial court properly instructed the jury that the statements could be considered only as evidence against Guillette, and the caution was repeated in the court's final charge to the jury. . . . We find that these limiting instructions were sufficient to protect Joost from any adverse effects of the admission of Guillette's declarations . . . .

United States v. Guillette, 547 F.2d 743, 755 (2d Cir. 1976), *cert. denied*, 434 U.S. 839 (1977) (citations omitted, emphasis added).

In another decision, the court stated,

> In deciding whether the trial court's action [in denying severance] was correct, a reviewing court should consider the need for judicial economy and the extent to which the judge instructed the jury to consider the evidence separately with respect to each defendant . . . .
>
> What chiefly persuades us that there was no error in the denial of severance here is Judge Dooling's careful instruction to the jury to consider the evidence against the two appellants separately.

United States v. Losada, 674 F.2d 167, 171 (2d Cir.), *cert. denied*, 457 U.S. 1125 (1982).

Other cases are in complete accord with the necessity for the trial court to adamantly caution the jury to refrain from considering evidence against those defendants against whom it is inadmissible: *United States v. Jenkins*, 785 F.2d 1387, 1394 (9th Cir.), *cert. denied sub nom, Prock v. United States*, 107 S. Ct. 192 (1986) (trial Judge was "careful to give several cautionary and limiting instructions to ensure the jury could compartmentalize the evidence."); *United States v. Hack*, 782 F.2d 862, 871 (10th Cir.), *cert. denied sub nom, Owens v. United States*, 106 S. Ct. 2921 (1986) (". . .the record demonstrates that the district judge used extreme care to insure that each defendant received a separate and impartial consideration of his case. *Throughout the trial, the court repeatedly admonished the jury to consider the evidence only against the defendant to whom it related"* (emphasis added)); *United States v. Rush*, 738 F.2d 497, 515 (1st Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985) (". . .the district court repeatedly instructed the jury during the trial and in the final charge to 'consider the evidence. . .separately with respect to each defendant' "); *United States v. Kabbaby*, 672 F.2d 857 (11th Cir. 1982):

The test for determining whether compelling prejudice from continued joinder exists is:

> whether under all the circumstances. . .it is within the capacity of the jurors to follow the court's admonitory instructions and accordingly to collate and appraise the independent evidence against each defendant solely upon that defendant's own acts, statements and conduct. In sum, can the jury keep separate the evidence that is relevant to each defendant and render a fair and impartial verdict as to him?

Id. at 861, quoting from *Tillman v. United States*, 406 F.2d 930, 935-36 (5th Cir.), *vacated in part on other grounds*, 395 U.S. 830 (1969); *United States v. Moosey*, 735 F.2d 633, 635 (1st Cir. 1984) ("The jury instruction was given at the time the evidence was offered, and adequately guarded against any prejudicial 'spillover.' "); *United States v.*

Bari, 750 F.2d 1169, 1178 (2d Cir. 1984), *cert. denied sub nom*, 105 S. Ct. 3482 (1985) ("The district court instructed the jury more than once that such evidence related solely to Benfield, and the court repeated the instruction in the jury charge."); *United States v. Dansker*, 537 F.2d 40, 62 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977) ("[T]he court emphatically cautioned the jury time and again that the evidence was only to be considered against [other] defendants. In light of these frequent and clear instructions, we can hardly assume that the jury nevertheless considered this evidence against [petitioner].").

There is a single question which hangs over these, and virtually all other severance/"spillover" cases: was the jury able to understand and apply the requirement that evidence admissible as to one defendant *not* be considered by them in determining the guilt of another defendant?[5] The answer to this question is universally found in an analysis of the conduct of the trial judge in assuring that the jury understands its obligation to "compartmentalize" the evidence.

In the instant case, the trial judge not only failed to instruct the jury that it should consider Monica Romero's testimony only as to Mondragon, the judge specifically instructed the jury to the *contrary*. The justification for failing to sever in this case is completely absent with respect to this testimony. The trial judge had three proper choices: (1) he could exclude the testimony based upon the defendant's objections; (2) he could admit it with an emphatic caution to the jury that was sufficient to permit a reviewing court to conclude that the jury would not

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[5]At every opportunity to treat petitioner and Mondragon the same, the jury did so. In every count of the indictment in which Mondragon and petitioner were both charged, their treatment by the jury was identical, the jury having found petitioner and Mondragon not guilty only as to one of the counts in which they were both charged. (R. 817-20). Cases in which partial acquittals were held to be evidence of a jury's ability to meticulously sift evidence do not apply here because, in those cases, one or more defendants were acquitted of charges of which other defendants were found guilty. *See e.g., United States v. Hewes*, 729 F.2d 1302 (11th Cir. 1984), *cert. denied*, 469 U.S. 1100 (1985). Thus, there is no logical basis for determining that an acquittal of petitioner on some counts raises a presumption that the jury was able to compartmentalize between petitioner and Rowand the evidence admitted at trial. If anything, the verdict in this case suggests the opposite.

have considered this evidence against petitioner; or (3) he could grant the severance motion. The trial judge opted for none of these but instead took the clearly erroneous step of instructing the jury that it was *free* to consider the evidence against petitioner. Under these circumstances, the severance should have been granted.

The New Mexico Court of Appeals, however, found that it ". . . need not discuss whether the testimony was hearsay or whether the instruction was sufficient because, even assuming the evidence was hearsay and the instruction insufficient, defendant is not entitled to a severance under the circumstances of this case." (App. a-7). The New Mexico Court of Appeals partially held that because petitioner did not request a limiting instruction he cannot be heard to complain. *State v. Martinez*, 102 N.M. 94, 691 P.2d 887 (Ct. App. 1984). (App. a-7). The New Mexico Court of Appeals overlooks the fact that the trial court immediately gave his own instruction from the bench. Petitioner argued below that trial court's instruction was insufficient to cure the error and it is the state's or trial court's burden to insure that the testimony is either properly limited or that evidence is later admitted which establishes its admissibility as to the objecting defendant. *United States v. Radeker*, 664 F.2d 242, 244 (10th Cir. 1982). The New Mexico Court of Appeals rejected the argument saying "to the extent *Martinez*, 102 N.M. 94, is inconsistent with *United States v. Radeker*, we follow *Martinez*." (App. a-7) Petitioner contends *Radeker* should control particularly when the trial court takes it upon itself to give an instruction to the jury that the evidence objected to could be considered against petitioner who had no involvement or knowledge of the testimony.

Finally, the New Mexico Court of Appeals finds that "Because . . . the evidence complained of was not devastating in its effect against defendant and because the evidence was one small part of a six-week long trial, we cannot say the effect of the evidence was so significant that the trial court abused its discretion in failing to grant a severance." Petitioner submits that in a conspiracy case such as this one, which was largely based on circumstantial evidence, the testimony of Monica Romero, which identified a series of highly inculpatory admissions by two of petitioner's alleged co-conspirators, can hardly be characterized

as not prejudicial to his defense. The Monica Romero testimony was so sensational and repulsive that it colored the minds of the jury in regards to petitioner who had no involvement in or knowledge of the crude scheme. For six weeks the jury saw petitioner sitting at the same jury table with defendant Mondragon. Their prior work required close association. The jury could not escape the inference that the co-defendants were involved in the same immoral scheme.

The decision of the New Mexico Court of Appeals thus conflicts with the decisions of this Court and of the federal courts cited herein.

3. WHETHER THE DECISION BELOW THAT THE PROSECUTOR'S CLOSING ARGUMENT DID NOT CONSTITUTE REVERSIBLE ERROR CONSTITUTES A DENIAL OF PETITIONER'S RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND IS INCONSISTENT WITH DECISIONS OF THIS COURT AND FEDERAL COURTS OF APPEALS.

During the state's rebuttal closing argument, the prosecutor made the following statement: "John Ramming and Dick Rowand made a million dollars on this criminal enterprise" (T. 158:353). Following the conclusion of the closing argument, the petitioner objected and moved to strike this portion of the closing argument from consideration by the jury. (T. 159:048). The trial court denied the motion. (T. 159:073-079).

There was no evidence in the record to support the prosecutor's statement. During the state's opening, the prosecutor told the jury that the state would prove that Ramming had received bribes or kickbacks totalling $15,000.00. (T. 20:326, 345). The evidence established that petitioner had borrowed $15,000.00 from Rowand. (T. 128:240-290, 310-347). Making "a million dollars" cannot be considered a fair inference from evidence of a $15,000.00 payment. The prosecutor's statement was calculated to have, and indeed had, the effect of assuring the jury that petitioner had made enormous profits from the alleged conspiracy when, in fact, there was no evidence that this was the case.

The New Mexico Court of Appeals agreed that there was no evi-

dence that petitioner made a million dollars. (App. a-8 and a-9). The New Mexico Court of Appeals, nevertheless, found that "The comment was one sentence in a discussion that focused on the culpability of another defendant. The magnitude of the improper comment simply does not rise to the level of reversible error when compared to comments in other cases in which we have held that reversible error was present." (citations omitted) App. a-10).

The decisions the New Mexico Court of Appeals relied upon are inconsistent with the following federal courts of appeals' decisions. When the prosecutor makes a statement during closing argument that is not supported by the evidence nor supported by any reasonable inference from the evidence, it is actually testimony by the prosecutor. *United States v. Vargas*, 583 F.2d 380 (7th Cir. 1978). There can be no question but that the intent of the prosecutor's closing argument was to "impress the jury with the prosecuting attorney's personal conclusion that the appellant was guilty. Such remarks expressing the personal opinion of the prosecuting attorney have been emphatically disapproved." *United States v. Rios*, 611 F.2d 1335, 1343 (10th Cir. 1979), *cert. denied*, 452 U.S. 918 (1981). It is not appropriate for the prosecutor to offer his own opinions as to guilt because it "not only violates the canon of ethics, it is invalid, for he is not a witness in the case, he is a representative." *United States v. Coppola*, 479 F.2d 1153, 1163 (10th Cir. 1973).

This improper statement was extremely prejudicial to the petitioner. The jury had heard six weeks of testimony about the money the taxpayers of New Mexico had spent on the various projects. The prosecution had stated in opening, (T. 20:510, 610-637, 645-651, 713-17, 21: 071-089), argued in closing, (T. 153; 154; 158:385), and the evidence had shown that the amounts spent on the various projects were unnecessarily high. (T. 24:082-607, 25:056-322). The intent of this closing argument was to tell the jury that this money, i.e., "a million dollars" went directly to petitioner. It led the jury to believe that Ramming had lined his pockets with the money spent on these projects, when there was absolutely no evidence in the record to support that proposition. The only evidence before the jury was that petitioner received $15,000.00, which petitioner testified was a loan on which he paid interest. (T. 128:

423). When the jury is asked to draw an inference that is not reasonably related to the evidence, "the suggestion of it cannot be justified as a fair comment on the evidence but instead is more akin to the presentation of wholly new evidence to the jury, which should only be admitted subject to cross-examination, to proper instructions and to the rules of evidence." *United States v. Vargas*, 583 F.2d 380, 385 (7th Cir. 1978).

Furthermore, when the judge asked the prosecutor for his response to the petitioner's motion to strike the statement, the prosecutor replied that he had no response. (T. 159:060). If the prosecutor thought the evidence supported his argument, he surely would have taken that opportunity to say so to the judge. He did not, because he could not; there was no evidence to support his statement.

In closing, the prosecutor assured the jury, without any evidentiary support, that petitioner actually had received a great deal more than the $15,000 loan. (T. 158:353). Indeed, a question which might properly have been on the jurors' minds was whether petitioner would have been willing to assist Rowand in his scheme to defraud the state of millions of dollars for a mere $15,000 "loan." Without any evidence in the record, the prosecutor answered the question during closing argument. "The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw." A.B.A. Standards, *The Prosecution Function*, §3-5.8 (2d ed. 1982). This is precisely what the prosecutor was attempting to do in this case. Stretching $15,000 to $1,000,000 was much more than exaggeration; it was testimony and it was grossly misleading testimony.

If the state had introduced legitimate testimony during trial demonstrating that petitioner had received a million dollars, the effect would have been predictably devastating. The prosecution should not be allowed the benefit of such a conclusion without any evidence justifying it. The prosecutor's closing argument contained serious, substantive error that denied the defendant a fair trial.

The New Mexico Court of Appeals in its holding on this issue found:

"We do not find reversible error on this issue because we find that the trial could have viewed the comment as too insignificant to warrant calling back the jury for special instruction on it". (App. a-9). The New Mexico Court of Appeals attempts to justify its holding by find that "[t]here were inferences from the evidence that defendant benefited from Rowand's money. Defendant and Rowand were friends and spent time together. Another of defendant's friends received monetary favors from Rowand". (App. a-9). Petitioner submits to this Court that the inferences found by the New Mexico Court of Appeals are not supported by the record and can not be used as a basis to justify the prosecutor's devastating closing comment that petitioner made a million dollars.

The prosecutor was testifying as to his own opinion and to matters never subjected to cross-examination. This represents significant misconduct and a denial of the petitioner's rights under the fifth and sixth amendments to the United States Constitution.

4. THE NEW MEXICO COURT OF APPEALS' REFUSAL TO ALLOW PETITIONER TO AMEND HIS DOCKETING STATEMENT TO INCLUDE A HEARSAY ISSUE DENIED HIM EQUAL PROTECTION OF LAW, THE RIGHT TO EFFECTIVE COUNSEL ON APPEAL AND DUE PROCESS OF LAW PROVIDED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND DECISIONS OF THIS COURT.

The New Mexico Court of Appeals considered the "Juror issue" on its merits since the transcript had been filed and petitioner and the State briefed the issue as it ordered on November 24, 1986. It went on to say, "/f/urther, the case we rely on for our decision on the severance issue also answers defendant's hearsay contention . . . Because we have decided the merits of the issues and that the decision is adverse to defendant, we need not decide the general issue of whether a docketing statement amendment and supplemental transcript request should be granted under the circumstances such as are present here (App. a-5).

The New Mexico Court of Appeals then went on to hold that petitioner's ". . . hearsay issue is dispositively answered by existing New

Mexico case law. . . ." even though it had denied petitioner's motion to amend his docketing statement to raise the issue. (App. a-5).

Petitioner first contends that the court below deprived him of his equal protection rights. In the decision below the court said: "[w]e note that meritorious issues will have been raised in the trial court or at least recognized by counsel at the time the docketing statement or initial memorandum in opposition is filed and, accordingly will be contained in the docketing statement or the first amendment thereto". (App. a-5).

The court below knew from petitioner's motions that he did not have a complete trial transcript because of the court reporter's delays in copying and providing tapes as well as the transcription of stenographic notes onto tape of bench conferences found in the court reporter's desk drawer.

The decision holds in part that a docketing statement cannot be amended after the time allowed for filing the first memorandum in opposition to summary disposition. (App. a-5). In so holding, as in its prior orders, the New Mexico Court of Appeals has created an arbitrary and capricious distinction between classes of appellants. If for example, an appellant is assigned to the general or limited calendar, he will have an indefinite period of time within which to identify additional issues and to amend. But, an appellant like petitioner assigned to the summary calendar, whose counsel would, if given the opportunity, identify the precisely same issue as did the counsel for the appellant on the limited or general calendar, is denied to raise those same issues on appeal.

Unless the court below has a compelling reason to deny the appellant on the summary calendar the opportunity to raise those same issues and at the same time grant such an opportunity to the appellant on the general calendar, it is a clear violation of the equal protection clause of the fourteenth amendment to the United States Constitution and Article II, Section 18 of the New Mexico Constitution. Criminal defendants are entitled to the equal protection of law on appeal. *Griffin v. Illinois*, 351 U.S. 12 (1956). Petitioner submits that the court below's determination that the hearsay issue sought to be considered was frivolous is not

a compelling reason to deny the motion to amend particularly in view of the fact that the court below considered the hearsay issue on its merits in its opinion. (App. a-5).

The New Mexico Court of Appeals considered the juror issue ". . . because the transcript has been filed and both the defendant and the state have briefed the juror issue on the merits, we have considered the issue on its merits". (App. a-5). The Court of Appeals again noted its concern ". . .that allowing the docketing amendment and supplemental transcript would contravene cases holding that unauthorized transcripts are not entitled to consideration [citation omitted] and holding that the appellate rules do not allow new appellate counsel to pick through the transcript for possible error. . . . [citation omitted]".

As previously stated the New Mexico Court of Appeals denied petitioner's motion to amend his second amended docketing statement by interlineation to add an issue pertaining to hearsay. The New Mexico Supreme Court had also declined to order the court below to accept the amendment. Consequently, petitioner did not fully brief the issue. In his brief-in-chief before the New Mexico Court of Appeals, however, petitioner made a footnote reference to the attempt to add the issue by an amendment to his docketing statement since the same testimony is also a ground for severance. (see f.n. 3 of this petition).

The New Mexico Court of Appeals considered the hearsay issue even though it had previously denied his motion to amend his docketing statement to add the issue saying ". . .the case we rely upon for our decision on the severance issue also answers defendant's hearsay contention. Because we have decided the merits of the issues and that decision is adverse to defendant, we need not decide the general issue of whether a docketing statement and supplemental transcript request should be granted under circumstances as are present here". (App. a-5). Petitioner submits that the New Mexico Court of Appeals' denial of his motion to amend his docketing statement denied him his right to due process of law and effective assistance of counsel on appeal. The error is compounded by the New Mexico Court of Appeals consideration of the hearsay issue since it was not before it on briefs with the assistance of

counsel and thus further denied him due process of law.

The vast majority of states do not have a similar requirement of a binding docketing statement written before counsel is aware of all the issues that might be present and before counsel has access to a complete transcript of proceedings. Instead, approximately half of the states require that the issues forming the basis of the appeal be listed first in the appellant's brief.[6]

Some states require assignment of errors or exceptions to be noted prior to the filing of the appellant's brief. Usually, the errors or exceptions are included in the record presented to the appellate court by the trial court.[7]

Some states require that the issues presented on appeal be included in the notive of appeal.[8] While some states require or allow a docketing statement,[9] an equal number make it advisory only.[10]

At least two states allow a criminal defendant to obtain a transcript before the filing of an appeal so as to protect the defendant's rights.[11]

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[6]Ala. R. App. P. 19; Ariz. R. Crim. P. 31.13; Ark. Sup. Ct. R. 9; Cal. Sup. Ct. R. 37; Del. Sup. Ct. R. 14; Idaho R. App. P. 14; Iowa R. App. P. 10; Me. R. Cr. P. 39(B); Md. R. App. P. 1031(c)(2); Mass. R. App. P. 16; Mich. R. App. P. 7.212(c)(4); Minn. R. Cr. P. 28.02(a); Mo. R. Cr. P. 30.06; Mont. Code Ann. §46-20-401 (1984); Neb. Rev. Stat. §25-1919 (1943); Nev. R. App. P. 10(2) and 28(a)(2); N.D. R. App. P. 28; Or. R. App. P. 7.19 and 205(7); Pa. R. App. P. 211; Tenn. R. App. P. 27; Tex. R. App. P. 74; Va. Sup. Ct. R. 5A:20; Wash. R. App. P. 10.3; Wyo. R. App. P. 501.

[7]Alaska R. App. P. 204(b) and 210(e) (can be later supplemented with leave of court); Fla. R. App. P. 9.140 and 9.200(f); Ind. R. App. P. 7.2; N.Y. [Crim. Proc] Law §460.10(3)(a) (McKinney 1983); N.C. R. App. P. 10; Okla. Ct. Cr. App. R. 2.1; R.I. R. App. P. 10 and 12.

[8]Colo. R. App. P. 3(g)(3) and 28 (advisory only); Conn. Sup. Ct. R. 3012 and 3013(d) (can be amended as of right until brief is filed); N.J. R. App. P. 2:5-1(f)(2); W. Va. Sup. Ct. R. 3.

[9]Utah R. App. P. 9 (within 21 days after notice of appeal filed); Ohio R. App. P. 3 (local trial court can require a docketing statement).

[10]Ill. Sup. Ct. R. 606(g); Kan. Sup. Ct. R. 2.041; Vt. R. App. P. 3(f).

[11]S.D. Codified Laws Ann. §23A-32-1 (1979); Wis. Stat. Ann. §809.30 (West 1985).

A criminal appellant in the federal system is under no obligation to identify issues on appeal until his brief is filed, unless less than a full transcript is ordered. Fed. R. App. P. 10(b)(3).[12] Thus, in the federal courts a defendant is not required to choose his issues on appeal until his appellate counsel has had an opportunity to thoroughly review the transcript on appeal.

The due process clause of the fourteenth amendment to the United States Constitution requires that if a state provides an appellate process, that process must be available to all criminal defendants. *Ross v. Moffitt*, 417 U.S. 600 (1974); *Griffin v. Illinois*, 351 U.S. 11 (1956). Article IV, section 2, of the New Mexico Constitution provides that all criminal defendants have an *absolute* right to appeal. The New Mexico constitution also provides that criminal defendants have a right to counsel on appeal. N.M. Const. art. III, §14. *See also Douglas v. California*, 372 U.S. 353 (1963).

Counsel on appeal means the effective assistance of counsel on appeal. *Evitts v. Lucey*, 469 U.S. 387 (1985); *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Ross v. Moffitt*, 417 U.S. 600 (1974); *McMann v. Richardson*, 397 U.S. 359 (1970); *Hardy v. United States*, 375 U.S. 277 (1964). Appellate counsel is obligated to act as a zealous advocate in behalf of his client. Rule 7-101, New Mexico Rules Governing the Practice of Law. *See also Evitts v. Lucey*, 469 U.S. 387 (1985); *United States v. Cronic*, 466 U.S. 648 (1984); *Anders v. California*, 386 U.S. 738 (1967). "The duty of counsel on appeal, . . . is not to serve as *amicus* to the Court . . ., but as advocate for the appellant." *Hardy v. United States*, 375 U.S. 277, 281 (1964).

The court below in its order of November 24th and in its opinion (App. a-5) states that "the concept of appellate rules is not to have new appellate counsel pick through the transcript for possible errors." If this is how the New Mexico rules of appellate procedure are to be interpreted, the rules severely limit counsel's ability to effectively assist his client, and deny the defendant his federal and state constitutional rights to due process and to effective assistance of counsel.

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[12]A non-binding docketing statement is required in the Tenth Circuit Court of Appeals. 10th Cir. R. 1.

There can be no doubt that it is the obligation of appellate counsel to "pick through" the record for all meritorious issues. "Careful exploration should be made of the possible errors that could be pressed on appeal, . . ." A.B.A. Standards for Criminal Justice §2.2 at 51 (1970). In *Hardy v. United States*, 375 U.S. 277 (1964), the Court held that appellate counsel could not adequately discharge his duty to represent an indigent federal habeas petitioner without making a careful examination of the complete transcript of the trial. "The right to notice 'plain errors or defects' is illusory if no transcript is available at least to one whose lawyer on appeal enters the case after the trial is ended." *Id.* at 280 (footnotes omitted). *See also* Boskey, *The Right to Counsel in Appellate Proceedings*, 45 Minn. L. Rev. 783, 792-93 (1961). In a concurring opinion in *Hardy*, Justice Goldberg succinctly defined the parameters of effective assistance of counsel on appeal:

> As any effective appellate advocate will attest, the most basic and fundamental tool of his profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law. Anything short of a complete transcript is incompatible with effective appellate advocacy.

If criminal defendants in New Mexico must submit docketing statements before having an opportunity to review trial transcript, amendment of the docketing statement must be liberally allowed. The New Mexico rules do provide that a docketing statement can be amended upon a showing of good cause. N.M.R.App.Proc. 208(h). (App. c-1). Appellate counsel's thorough review of the transcript resulting in the discovery of reversible error must be considered good cause to amend a docketing statement. By denying Petitioner's Motion to amend his docketing statement to add the hearsay issue, the court below denied him the right to the appeal guaranteed to him by the New Mexico and United States Constitutions.

CONCLUSION

A writ of certiorari should be granted to review the actions of the trial court and the New Mexico Court of Appeals for the reasons set forth in this petition.

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APPENDIX A

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v. No. 9277

JOHN W. RAMMING,

Defendant-Appellant.

**APPEAL FROM THE DISTRICT COURT
OF SANTA FE COUNTY**

BRUCE E. KAUFMAN, District Judge

Nancy Hollander
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OPINION

BIVINS, Judge

Convicted of multiple counts of kickbacks, fraud, racketeering and conspiracy, defendant appeals. During the pendency of the appeal, then Governor Toney Anaya issued an executive order granting defendant a pardon for all counts except one count of conspiracy. Defendant has expressly abandoned his appeal as to all counts for which he received a pardon. Thus, he appeals from his conviction for conspiracy; any appeal from other convictions is dismissed. We affirm the conviction and sentence for conspiracy.

We state the facts and discuss (1) preliminary matters; (2) whether the trial court erred in failing to grant defendant a severance; (3) whether reversal is required because of a prosecutor's comment during closing argument; (4) whether the trial court erred in admitting summary documents into evidence; and (5) whether defendant's issue concerning the trial court's communication with a prospective juror requires reversal.

FACTS

The evidence reflects that in 1984 and 1985 a contractor, Richard Rowand, and his company, CRW Development Corporation, received $2,800,000 in state money for construction of various disaster projects. An engineer, Levi Valdez, and his company, Valdez Engineering Company, also received state money for work done on some of the projects. The monies were provided after the governor issued disaster declarations.

The evidence showed that each of the projects had its own problems. Some were not genuine disasters or emergencies. In some, there were excessive change orders. In some, the work done was unnecessary; in others, it was simply shoddy; in others, it was not done at all. No one seems to dispute that Rowand cheated the state out of hundreds of thousands of dollars.

The proceedings below concerned defendant, the governor's authorized representative, who recommended to the governor when and where to issue disaster declarations, and Pete Mondragon, who worked in the Civil Emergency Preparedness Division, administering the disaster funds. Rowand was defendant's friend; Valdez was Mondragon's friend.

During the time the contracts were being awarded for the projects and the work was being performed, defendant received $15,000 from Rowand. A friend of defendant received $14,000. Defendant characterized these as loans. During the same time, Mondragon and his daughters received a number of vehicles from Rowand. Mondragon, too, characterized them as loans.

The state had charged that each defendant aided and abetted the frauds committed in connection with each project. The state also charged bribery, kickbacks, racketeering and conspiracy. Defendant and Mondragon were tried together. Each defendant was convicted of fraud in connection with all projects but one; each defendant was also convicted of conspiracy, racketeering and bribery or kickbacks or both.

1. Preliminary Matters

Defendant's original docketing statement raised thirteen issues and some of those had subissues. In addition, defendant has amended his docketing statement and attempted to amend it to raise other issues. We recite the procedural posture of the appeal because our discussion of it disposes of all issues except the four we discuss later.

In response to the original docketing statement, this court issued a calendaring notice proposing summary affirmance. Defendant filed a memorandum in opposition and motion to amend the docketing statement. The memorandum in opposition abandoned all original issues except for three: (1) the severance issue; (2) the issue concerning the summary documents; and (3) the issue concerning the closing argument comment. *See State v. Martinez*, 97 N.M. 585, 642 P.2d 188 (Ct.App.1982). The memorandum also argued a fourth issue (concerning the racketeer-

ing instruction) raised in the motion to amend, which we granted.

Our second calendaring notice also proposed summary affirmance. In response, defendant filed a second motion to amend the docketing statement to raise an issue concerning the alleged erroneous admission into evidence of hearsay. Specifically, defendant alleged that the trial court erred in allowing one of Mondragon's daughters to testify that Rowand and Mondragon asked her to say that Rowand gave her a vehicle during an affair she had had with him. We denied the motion to amend because the rules do not contemplate that a defendant may amend his docketing statement to raise a new issue each time this court grants a previous motion to amend and proposes summary affirmance. *See State v. Smith*, 102 N.M. 350, 695 P.2d 834 (Ct.App.1985). After receiving defendant's memorandum in opposition to our second calendaring notice, we reassigned this case to the limited calendar.

Following our assignment of this case to the limited calendar, defendant filed yet another motion to amend his docketing statement, together with a motion to file a supplemental transcript of the proceedings relating to the issue with which he wanted to amend his docketing statement at that time. Appellate counsel, who was different than trial counsel, had learned that, after the jury was selected, but before it was sworn, a juror had had a conference with the trial court.

At the time defendant filed his motion to amend the docketing statement to raise the issue of the trial court's conversing with the juror in defendant's absence, and his motion for a supplemental transcript, this court entered an order providing that the transcript could be filed conditionally and that defendant could brief the issue of whether the trial court erred by holding the conference. This order reserved deciding whether to allow the docketing statement amendment and the filing of the supplemental transcript until the time the case was finally decided. Our order setting forth this procedure stated the court was concerned that allowing the docketing statement amendment and supplemental transcript would contravene cases holding that unauthorized transcripts are not entitled to consideration, *State v. Robertson*, 90 N.M. 382, 563 P.2d 1175 (Ct.App.1977), and holding that the appellate rules do not

allow new appellate counsel to pick through the transcript for possible error, *State v. Jacobs*, 91 N.M. 445, 575 P.2d 954 (Ct.App.1978).

Defendant's brief argues that our denial of the docketing statement amendment to allow the hearsay issue and our potential denial of the docketing statement amendment to allow the juror issue will deny him his right to due process of law and effective assistance of counsel. Because the transcript has been filed and because both defendant and the state have briefed the juror issue on the merits, we have considered the issue on its merits. *See* "5. *Communication with Prospective Juror.*" Further, the case we rely on for our decision on the severance issue also answers defendant's hearsay contention. *See* "2. *Severance.*" Because we have decided the merits of the issues and that decision is adverse to defendant, we need not decide the general issue of whether a docketing statement amendment and supplemental transcript request should be granted under circumstances such as are present here.

We note, however, the rules contemplate that meritorious issues will have been raised in the trial court or at least recognized by counsel at the time the docketing statement or initial memorandum in opposition is filed and, accordingly, will be contained in the docketing statement or the first amendment thereto. Indeed, in this case, defendant's new juror issue was not preserved, because it was not raised in the trial court and because it is not within that category of issues that can be raised for the first time on appeal. His hearsay issue is dispositively answered by existing New Mexico case law. The rules do not contemplate that such issues will be the subject of successful motions to mend. *State v. Rael*, 100 N.M. 193, 668 P.2d 309 (Ct.App.1983). There is nothing unfair or unconstitutional about denying defendant the right to raise non-meritorious issues. *See Jones v. Barnes*, 463 U.S. 745 (1983.

Other issues, which were listed in the docketing statement but not briefed, are abandoned. *State v. Romero*, 103 N.M. 532, 710 P.2d 99 (Ct.App.1985). Finally, defendant expressly abandons his issue concerning the racketeering instruction because of his pardon on the racketeering count. Thus, defendant agrees with the state that the appeal is moot as to the convictions for which defendant was pardoned. Because of this,

we deny defendant's motion to vacate and remand the pardoned counts.

2. Severance

Defendant contends his trial should have been severed from that of co-defendant Mondragon. Defendant moved for a severance on a number of grounds and originally raised those grounds in his docketing statement and memoranda in opposition. Now, however, in his brief, he limits his argument to one specific contention. Thus, grounds other than the one specifically addressed have been abandoned. *State v. Romero.*

Defendant's specific argument is that the trial court should have granted a severance when defendant objected to the testimony of Mondragon's daughter, Monica Romero. The substance of that testimony was that Mondragon and Rowand asked her to lie about the circumstances surrounding her receipt of a vehicle from Rowand. The vehicle was titled in her name. They asked her to tell investigators that the gift of the vehicle was a result of an affair she had had with Rowand.

Following a bench conference on this issue, the trial court instructed jury as follows:

> Ladies and gentlemen of the jury, the court instructs you that the testimony being elicited from this witness may seem to bear on one or more of the defendants in the case or may seem to focalize principally on one. In any event, all of the evidence is subject to connection and further instruction by the court at a later time, and this evidence will be considered by you, together with all the other evidence in the case, for such weight as you may choose to give it, bearing on the cases of any of the defendants herein. You may proceed.

Defendant did not request a limiting instruction.

Defendant contends the evidence was hearsay, inadmissible against him, and that the instruction erroneously allowed the jury to consider Monica's evidence against him. The state contends the instruction told

the jury to consider Monica's evidence against her father as bearing only on her father. We need not discuss whether the evidence was hearsay or whether the instruction was sufficient because, even assuming that the evidence was hearsay and the instruction insufficient, defendant is not entitled to a severance under the circumstances of this case.

In *State v. Martinez,* 102 N.M. 94, 691 P.2d 887 (Ct.App.1984), this court considered a similar issue. Defendant there had raised a hearsay issue because evidence admissible against a co-defendant was admitted in their joint trial; he also raised a severance issue based on this evidence. In that case, we held that an admonitory instruction could cure the admission of hearsay statements of one defendant as long as the hearsay did not unerringly and devastatingly refer to the complaining defendant. Because defendant there did not request an instruction, we held that he could not be heard to complain. We also held that defendant's severance issue was answered on the same ground, i.e., that a severance was not necessary when the introdution of inadmissible statements could be cured by instruction. Here, because defendant did not request a limiting instruction, he cannot be heard to complain. *Id.*

Defendant relies on federal cases for the propositions that the trial court's instruction was insufficient to cure the alleged error and that it is the state's or the trial court's burden to give a correct instruction. These cases, particularly *United States v. Radeker,* 664 F.2d 242 (10th Cir.1981), relied upon for the latter proposition, are not presuasive. First, *United States v. Radeker* involved the admission of evidence pursuant to the co-conspirator section of Fed. R. Evid. 801 and the federal rule that the trial court has to make particular findings when admitting evidence pursuant to that section. Our research reveals no similar rule requiring express findings in New Mexico. Second, to the extent that *Martinez,* 102 N.M. 94, is inconsistent with *United States v. Radeker,* we follow *Martinez.*

In addition, the evidence did not point unerringly to defendant's guilt nor was it devastating in its effect against defendant. First, evidence of Mondragon's crude scheme was not directly inculpatory as to defendant. Second, in contrast to Mondragon receiving vehicles in the names

of others and attempting to further hide his receipts, the evidence was that defendant openly received money in the form of a loan upon which he paid interest. Defendant's counsel specifically pointed out this contrast to the jury during his closing argument.

Moreover, in addition to *Martinez*, 102 N.M. 94, a case we believe directly answers defendant's severance contention adversely to him on the basis that the evidence that allegedly "spilled over" could have been cured by instruction, we would arrive at the same result utilizing ordinary principles of appellate review applicable to severance issues. Defendant's brief recognizes that "[a]ppellate courts unanimously grant trial judges broad discretion in granting or denying motions for severance. *See, e.g., State v. Baca*, 85 N.M. 55, 508 P.2d 1352 (Ct.App. 1973)." He also recognizes that "[i]t is undeniable that almost all appellate decisions which address complaints of prejudicial spillover affirm trial courts' denials of severance."

Thus, the standard of review applicable to a severance issue is exceedingly narrow. The essence of such review involves the question of whether, due to the joint trial, there is an appreciable risk that the jury convicted for illegitimate reasons. *See State v. Segotta*, 100 N.M. 18, 665 P.2d 280 (Ct.App.), *rev'd on other grounds*, 100 N.M. 498, 672 P.2d 1129 (1983). Because, as explained above, the evidence complained of was not devastating in its effect against defendant and because the evidence was one small part of a six-week long trial, we cannot say the effect of the evidence was so significant that the trial court abused its discretion in failing to grant a severance. Accordingly, we affirm the trial court on this issue.

3. Closing Argument Comment

Defendant complains of a comment made by the prosecutor during his rebuttal closing argument to the effect that defendant and Rowand made a million dollars on this criminal enterprise. There was no evidence that defendant made a million dollars; there was only evidence that defendant received $15,000. Defendant contends the prosecutor's erroneous comment amounted to testimony by the prosecutor and the ex-

pression of a personal opinion. We disagree.

We must consider the comment in the context in which it was made, *see State v. Musgrave*, 102 N.M. 148, 692 P.2d 534 (Ct.App.1984) (motion to dismiss properly denied because comments were unintentional), and we also consider the timeliness of defendant's objection. We do not consider timeliness for the purpose of barring defendant's issue, *see State v. Carmona*, 84 N.M. 119, 500 P.2d 204 (Ct.App.1972), but rather for the purpose of evaluating the trial court's response to the objection. The trial court ruled on the merits of defendant's motion and so do we. *State v. Diaz*, 100 N.M. 210, 668 P.2d 326 (Ct.App.1983).

The context in which the comment was made reflects that the prosecutor was discussing the liability of co-defendant Mondragon. The prosecutor was pointing out that, although Mondragon did not make a lot of money from the enterprise, he did facilitate it. This was in contrast to defendant and Rowand, who, according to the prosecutor, did make a lot of money. It is a fair inference from the evidence that Rowand did make a lot of money. He received close to $3 million in contracts and substantial amounts of the billings were for services not performed or goods not worth the amount charged for them. However, defendant is correct that there is no evidence that he personally made a million dollars from the enterprise.

The comment was made midway through the rebuttal closing argument, following which the trial court excused the jury for the day. The next morning, following some discussion on matters involving exhibits that would go to the jury, but before the jury actually retired to deliberate, defendant made his objection to the comment and moved to strike it. The trial court denied the motion.

We do not find reversible error on this issue because we find that the trial court could have viewed the comment as too insignificant to warrant calling back the jury for special instruction on it. There were inferences from the evidence that defendant benefitted from Rowand's money. Defendant and Rowand were friends and spent time together. Another of defendant's friends received monetary favors from Rowand.

To have instructed the jury accurately regarding the comment would have involved more than a mere admonition to simply disregard the comment.

The comment was one sentence in a discussion that focused on the culpability of another defendant. The magnitude of the improper comment simply does not rise to the level of reversible error when compared to comments in other cases in which we have held that reversible error was present. *See, e.g., State v. Henderson,* 100 N.M. 519, 673 P.2d 144 (Ct.App.1983) (prosecutor told lengthy, supposedly true story of another defendant that was not based on any evidence in the case and only served to prejudice defendant); *State v. Diaz* (prosecutor referred to his own authority, made derogatory and abusive remarks about defendant, and continually misstated the law). The one brief comment in this case did not render defendant's six-week trial unfair. *Cf. State v. Clark,* 105 N.M. 10, 727 P.2d 949 (Ct.App.1986) (error, if any, in prosecutor's three comments was harmless, where trial court sustained objections to each one and admonished jury as to last two).

4. Summary Documents

During the trial, the state introduced summaries of telephone records through an investigator of the attorney general's office. This witness testified, and the parties stipulated, that certain numbers in the governor's office were assigned to defendant. The parties also stipulated that the telephone records upon which the summaries were based were true and correct records of telephone subscribers' names and calls made. Over 300 telephone calls were made between the particular telephone numbers.

Defendant contends that summaries of telephone records should not have been admitted into evidence because they were irrelevant and more prejudical than probative. He contends they were irrelevant because there was no evidence that defendant himself actually made or received any of the calls. It is undisputed that the calls were made to and from defendant's numbers. Defendant also contends that the error was magnified because calls on certain dates were highlighted. The purpose of the

telephone records was to show defendant's many contacts with Rowand.

Admission of evidence is discretionary with the trial court. *State v. Martinez*, 102 N.M. 94. Although the evidence must in some manner be connected with defendant, *State v. Young*, 103 N.M. 313, 706 P.2d 855 (Ct.App.1985), it is not necessary that it relate directly to the facts in controversy. *Id.* Evidence may be relevant even if it is circumstantial. Doubts concerning the connection of the summaries with this case go to the weight of the evidence, not to their admissibility. *State v. Copeland*, 105 N.M. 27, 727 P.2d 1342 (Ct.App.1986); *State v. Belcher*, 83 N.M. 130, 489 P.2d 410 (Ct.App.1971). The fact that all the calls were made to and from defendant's numbers and other numbers connected to the case made them relevant. The fact that the calls occurred at times that were associated with the bribes, kickbacks and contracts awarded Rowand also makes the evidence relevant.

This evidence reflects, circumstantially, that during the relevant period Rowand called a number specifically assigned to defendant at the governor's office 77 times; the general number for the governor's office 45 times; defendant's Santa Fe residence 49 times; and defendant's Taos residence 24 times. These calls, together with calls to Rowand's number from numbers associated with defendant, totalled 337 calls for a total of 960 minutes. We agree with the state that the number of calls, circumstantially connecting defendant with Rowand at critical times, has evidentiary value. The fact that the evidence prejudiced defendant is not grounds for excluding it. *State v. Hogervorst*, 90 N.M. 580, 566 P.2d 828 (Ct.App.1977). Finally, defendant cites no authority for the proposition that it was improper to allow the witness to highlight the exhibit. *See in re Adoption of Doe*, 100 N.M. 764, 676 P.2d 1329 (1984). No error is shown in this issue.

5. Communication with Prospective Juror

Defendant claims that voir dire of a juror outide his presence denied him a fair trial. This issue arose after the jury was selected, but before it was sworn, when one juror wanted to tell the trial court that she feared the other jurors were not intelligent enough to decide the case. At this

point, defendant had exhausted all of his peremptory challenges. In the presence of all counsel and defendants, and before anyone knew what the juror wanted, the participants decided that only the trial court and counsel would talk with the juror. This was so that the juror would feel free to speak her mind. After the trial court and counsel questioned the juror and ascertained her concern, and were satisfied this would not affect her ability to serve, all counsel agreed that they still wanted this juror to sit on the jury. Defendant voiced no objection to the procedure followed, but now claims there was error of such proportions that no objection was required.

Defendant relies on *State v. Garcia*, 95 N.M. 246, 620 P.2d 1271 (1980), for the proposition that a defendant has the right to be present during all stages of the trial, including the selection of the jury in chambers. We have no disagreement with the law set forth in *Garcia*, but believe it is inapplicable here for two reasons. First, *Garcia* involved the selection of the jury whereas, here, defendant agrees that the jury had already been selected. Defendant acknowledges that he had exhausted all of his peremptory challenges by the time of the conversation. Nonetheless, he contends, without citation to authority, *see In re Adoption of Doe*, that he could have challenged the juror for cause based on her answers to questions during the interview. Because of the lack of citation, we do not review this contention further. *Id.* Defendant's only reason for belatedly wishing to be present during the conversation is so that he could "assess any 'negative visceral reaction' he felt toward the juror, to consult with and advise his counsel, and to challenge the juror for cause based on her answers." We know of no authority that would allow a defendant to challenge a juror for cause for this reason.

Second, in *Garcia*, the defendant objected to his absence whereas, here, it appears that defendant agreed to his absence for the purpose of encouraging open communications. To overcome his lack of objection, defendant relies on a series of cases involving communications with actual jurors. In a line of cases culminating with *Hovey v. State*, 104 N.M. 667, 726 P.2d 344 (1986), our courts have held that it is improper for a judge to communicate with the jury about the issues in the case in the absence of defendant and that, when such happens, a presumption of

prejudice arises, which the state has the burden of overcoming, regardless of defendant's failure to object.

In *Hovey*, and the cases it cites, the communications occurred during deliberations and involved matters concerning the deliberations, directly bearing on the issues in the trial. The cases obviously reflect the sacrosanctity of the jury's deliberative process. *See State v. Coulter*, 98 N.M. 768, 652 P.2d 1219 (Ct.App.1982) (presence of alternate juror during jury deliberations created presumption of prejudice, which the state failed to overcome). On the other hand, when communications occur prior to trial, a different analysis is used. *See State v. Henry*, 101 N.M. 277, 681 P.2d 62 (Ct.App.), *rev'd on other grounds*, 101 N.M. 266, 681 P. 2d 51 (1984) (possibility of invited error and harmlessness).

We believe this case is controlled by *Henry* and not by *Garcia* or *Hovey*. Defendant was personally aware that the juror wanted to talk, and was present and did not object when the decision was made for counsel and the trial court to talk with the juror. The subject of the conversation, although certainly bearing on the trial, did not involve any specific issues. Both counsel, by their remarks after the conversation, expressed satisfaction with the jury and with this particular juror. Defendant could have done nothing about this juror in any event. Thus, we view error, if any, in conversing with the juror in the absence of defendant as both harmless and invited.

Defendant also contends that additional error was committed when the trial court apparently conversed with the juror before counsel arrived. We do not know whether this was while counsel were filing into the room or earlier, perhaps when the trial court found out that the juror wanted to talk. We know about this conversation because the trial court mentioned on the record that the juror had told him that she did not know the jury had been "finalized."

We disagree with this final contention for two reasons. First, we see nothing improper for the trial court, in the absence of defendant or counsel, to ascertain what the juror wants to talk about. *State v. LaPierre*, 39 N.J. 156, 188 A.2d 10, *cert. denied sub nom., Bisignano*

v. New Jersey, 374 U.S. 852 (1963). Second, the record is less than clear as to whether counsel were in the room during the conversation. In an issue such as the one under consideration, the record must affirmatively show absence. *State v. Hinojos*, 95 N.M. 659, 625 P.2d 588 (Ct.App.1980).

CONCLUSION

The conviction and sentence for conspiracy are affirmed. The appeal from any other conviction is dismissed.

IT IS SO ORDERED.

/s/
WILLIAM W. BIVINS, Judge

WE CONCUR:

/s/
PAMELA B. MINZNER, Judge

/ s /
RUDY S. APODACA, Judge

APPENDIX B

NEW MEXICO CRIMINAL PROCEDURE RULE 47

Rule 47. Presence of the defendant; appearance of counsel.

(a) **Presence required.** The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict and the imposition of any sentence, except as otherwise provided by this rule.

(b) **Continued presence not required.** The further progress of the trial, including the return of the verdict, shall not be prevented and the defendant shall be considered to have waived his right to be present whenever a defendant, initially present:

(1) voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial); or

(2) engage in conduct which is such as to justify his being excluded from the courtroom.

(c) **Presence not required.** A defendant need not be present in the following situations:

(1) a corporation may appear by counsel for all purposes;

(2) in prosecutions for offenses punishable by fine or by imprisonment for a term of less than one year, or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence;

(3) at a conference or argument upon a question of law. [As amended, effective October 1, 1974.]

APPENDIX C

NEW MEXICO RULES OF APPELLATE PROCEDURE

12-208. Docketing the appeal.

A. **Attorney responsible.** Trial counsel shall be responsible for preparing and filing the docketing statement unless relieved by order of the appellate court.

B. **When filed; contents.** Within thirty (30) days after filing the notice of appeal in all appeals except those under Rules 12-203, 12-204, 12-603, 12-604, and 12-605, the appellant shall file a docketing statement with the appellate court clerk. The appellant shall serve a copy of the docketing statement on the district court clerk and on those persons who are required to be served with a notice of appeal pursuant to Rule 12-202. The docketing statement shall contain:

(1) a statement of the nature of the proceeding;

(2) the date of the judgment or order sought to be reviewed, and a statement showing that the appeal was timely filed;

(3) a concise, accurate statement of the case summarizing all facts material to a consideration of the issues presented;

(4) a statement of the issues presented by the appeal, including a statement of how they arose and how they were preserved in the trial court, but without unnecessary detail. The statement of issues should be short and concise and should not be repetitious. General conclusory statements such as "The judgment of the trial court is not supported by the law or the facts" will not be accepted;

(5) a list of authorities believed to support the contentions of the appellant and any contrary authorities known by appellant. Argument on the law shall not be included, but a short, simple statement of the pro-

position for which the case or text is cited shall accompany the citation;

(6) a statement specifying whether the entire proceedings were tape recorded, and if not, identifying the portion of the proceedings, other than the record proper, not tape recorded;

(7) a reference to all related or prior appeals. If the reference is to a prior appeal, the appropriate citation should be given; and

(8) where applicable, a copy of the order appointing appellate counsel.

C. **Docketing statement; amendment.** The appellate court may, upon good cause shown, allow for the amendment of the docketing statement.

D. **Cross-appeals.** A party who files a cross-appeal in accordance with Paragraph B of Rule 12-201 shall file a docketing statement in accordance with this rule within thirty (30) days after the notice of appeal is filed by the cross-appellant and shall pay a docket fee as provided in Paragraph E of this rule.

E. **Docket fee.** Except where free process has been granted on appeal, the docket fee shall accompany all docketing statements filed unless the party filing the docketing statement has already paid a docket fee.